

ORIGINAL

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
IN AND FOR THE STATE OF UTAH

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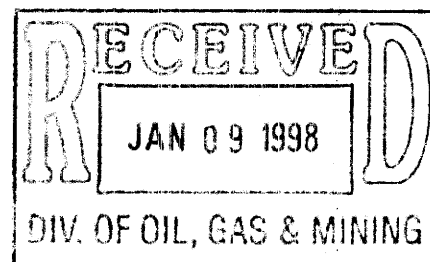
IN THE MATTER OF THE FIVE- : Docket No. 95-025
YEAR PERMIT RENEWAL, CO-OP :
MINING COMPANY, BEAR CANYON:
MINE, EMERY COUNTY, UTAH. : Cause No. ACT/015/025

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Wednesday, December 10th, 1997, a hearing was
held in the above matter before the Board of Oil, Gas and
Mining, at the Department of Natural Resources, 1594 West
North Temple, Room 1040A, Salt Lake City, Utah.

Reported by:

Scott M. Knight, RPR



ASSOCIATED PROFESSIONAL REPORTERS, L.C.

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P R O C E E D I N G S

MR. LAURISKI: This brings us to Agenda Item No. 3, Docket No. 95-025, Cause No. ACT/015/025. This is in the matter of the five-year permit renewal, Co-Op Mining Company, Bear Canyon Mine, Emery County, Utah.

This matter before the Board today is to consider the request for arguments on the appointment of a hearing examiner and also the issue that deals with collateral estoppel. And just so that all the parties understand, that's what the Board intends to hear today. I assume no one else has -- you don't have all your experts here, Mr. --

MR. APPEL: No. We're not planning on submitting evidence.

MR. LAURISKI: If you would, for the record, gentlemen, please identify yourselves for the court reporter.

MR. APPEL: Jeffrey Appel of the firm of Appel & Warlaumont on behalf of Castle Valley Special Service District.

MR. ELLSWORTH: Scott Ellsworth of Nielsen & Senior on behalf of Huntington-Cleveland Irrigation Company and North Emery Water Users Association.

MR. HANSEN: Mark Hansen on behalf of Co-Op Mining Company.

1 MR. MOQUIN: Dan Moquin. I'm representing the
2 Division of Oil, Gas & Mining.

3 MR. LAURISKI: Thank you. Which matter do we
4 want to take up first?

5 Mr. Hansen, are you prepared to address the
6 Board relative to collateral estoppel?

7 MR. HANSEN: And I am. And the boss will do
8 it however he sees fit.

9 MR. LAURISKI: Let's do it.

10 MR. HANSEN: There are a number of items on
11 the agenda, obviously. I don't believe we have to block
12 out an hour for arguments, so I'll try to basically
13 summarize fifty pages of argument by all parties in about
14 five minutes.

15 To get undisputed matters out of the way, it's
16 clear that collateral estoppel is the law in Utah, that
17 it applies to administrative proceedings, and that one --
18 when the elements are met, that application of the
19 doctrine is mandatory, not discretionary.

20 MR. CHRISTENSEN: Excuse me. Would you use
21 the microphone.

22 MR. HANSEN: Do I need to start over?

23 MR. CHRISTENSEN: No.

24 MR. HANSEN: There are four elements that have
25 to be met for collateral estoppel to apply: The issues

1 in the two adjudicatory proceedings have to be identical;
2 there needs to be a final judgment on the merits of the
3 first proceeding; the parties, or the privies, in the
4 second proceeding need to be identical to the parties in
5 the first proceeding; and the issue in the first
6 proceeding has to be competently, fully, and fairly
7 litigated.

8 Whether there -- there's clearly a final
9 judgment on the merits here. We're talking about the
10 Board decision affirmed on appeal to the Utah Supreme
11 Court pertaining to the Tank Seam proceedings. The
12 parties are identical.

13 And so the only questions that remain are
14 whether there are issues to be resolved in the current
15 proceeding that are identical to the issues that were
16 resolved in the Tank Seam hearing, and if those issues
17 were competently, fully, and fairly litigated in the Tank
18 Seam hearing.

19 There's been some statements made to the
20 effect that before the Board can determine whether the
21 issues are identical, the Board is first going to have to
22 look at the evidence. With all due respect, that kind of
23 turns the very idea of collateral estoppel on its head.

24 The Board's job is to resolve the objections
25 raised by the water users. Those objections determine

1 the nature of the claims in this case, and those claims
2 determine what issues are to be resolved. And then, in
3 turn, the issue is to determine what evidence is
4 relevant.

5 And so, rather than looking at the evidence to
6 decide what the issues are, you look at the issues to
7 decide what the evidence is. To do otherwise would
8 require presenting the evidence in advance of deciding
9 what -- whether collateral estoppel applies. That's the
10 very result the entire doctrine of collateral estoppel is
11 intended to prevent: to prevent the need to go over the
12 evidence if the issues are identical. And so we need to
13 look at what those issues are.

14 And neither the water users or the Division in
15 any of their pleadings have talked about what specific
16 issues are out there. And I have attempted to identify
17 what I think are the specific issues that were resolved
18 and decided in the Tank Seam hearing that are also raised
19 in this proceeding.

20 Whether or not Big Bear Spring is
21 hydrologically connected to Co-Op's permit area. In the
22 Tank Seam hearing, the Board made the determination that
23 there was no hydrologic connection.

24 Whether or not Birch Spring is hydrologically
25 connected to Co-Op's permit area. Again, in the Tank

1 Seam hearing, the Board determined that it was not.

2 Now, at the date of the Tank Seam hearing, the
3 Board also determined, at least as of that time, neither
4 the quantity nor the quality of the water at either
5 spring had been affected by mining operations. That was
6 an issue raised and resolved in the Tank Seam hearing.
7 And what happened before that date would be the identical
8 issue that would be raised in this proceeding.

9 Also, as of that date, the Board determined
10 that Co-Op's mining operation was designed to prevent
11 material damage to the hydrological balance outside the
12 permit area.

13 Now, if the water users want to come forward
14 with evidence as to what has occurred after the Tank Seam
15 hearing to show some change in the mining operations
16 since that time, there ought to be a different issue.
17 But if the mining operation as it is now is identical to
18 the mining operation as it was then, that issue has
19 already been resolved. That particular type of mining
20 operation was designed to prevent material damage.

21 And finally, at the date of the Tank Seam
22 hearing, the Board determined that Co-Op's permit
23 application was complete, was accurate, was in full
24 compliance with all statutory and regulatory
25 requirements.

1 If the water users have some evidence to show
2 that since the date of the Tank Seam hearing there have
3 been changes made to the permit application, that such --
4 those changes make the permit no longer complete and
5 accurate, that would be a new issue. It would not be
6 subject to collateral estoppel. But if what the water
7 users want to do is look at the contents of the permit
8 application that have been unchanged since that time,
9 that issue has already been resolved. Collateral
10 estoppel applies.

11 There is kind of a subissue within the
12 question of whether the issue was competently, fully, and
13 fairly litigated. We have a Utah Appellate case, Cooper
14 State Thrift & Loan that I have cited which expands on
15 that particular issue of collateral estoppel and explains
16 that that element is satisfied if the requirements of due
17 process have been met; in other words, if notice was
18 given, the parties had an opportunity to be heard, the
19 parties had their day in court.

20 And in the petition for review of the Tank
21 Seam hearing, the Utah Supreme Court has already
22 determined in this particular case that those elements
23 had been met. In other words, if the Board resolved
24 those issues in its Tank Seam order, the Utah Supreme
25 Court has already reviewed that order and determined that

1 those issues were competently, fully, and fairly
2 litigated.

3 One subissue which was raised by water users
4 was a question whether the issues that were resolved
5 essential or necessary to resolve the Tank Seam action.
6 The rationale for going into that field is that if the
7 resolution of those issues in the Tank Seam hearing would
8 not have affected the outcome of the hearing, then the
9 parties would have no incentive to litigate those issues;
10 and therefore, those issues would not have been
11 competently, fully, and fairly litigated.

12 Now, the Court -- the Utah Supreme Court in
13 that case already held that those issues were
14 competently, fully, and fairly litigated. But also on
15 that point, if there are -- if there are two issues,
16 either of which, standing independently, is sufficient to
17 support the result, and both of those issues are upheld
18 on appeal, then collateral estoppel applies to both
19 issues. In other words, if an issue is upheld on appeal,
20 that is a determination of this necessary language.

21 If it -- that were not the case, the more
22 independent issues a party has to support its position,
23 the more independent issues it is able to prove to
24 establish its position, the less likely collateral
25 estoppel would be to apply. And that would be an absurd

1 result. The better -- the result that -- a better a
2 person's proof is, the less they're entitled to the
3 protection of collateral estoppel. And the Castle Valley
4 decision has upheld the Board's finding that there was a
5 lack of hydrological connection between the permit and
6 both springs.

7 As far as this question of whether the -- the
8 issues that I've identified were essential or necessary
9 to the Board's decision, I think it's pretty clear that
10 the last three issues that I've identified -- whether the
11 quantity or quality of water at the springs had been
12 impacted, whether Co-Op's mining operation was designed
13 to prevent material damage, and whether Co-Op's permit
14 application was complete and accurate -- clearly, those
15 three issues were essential to resolve.

16 The only two other issues we ask the Board to
17 consider here are the hydrological connection between the
18 permit and each of the two springs. For the Board to
19 consider that point, I think we need to go back and
20 recall what happened during the Tank Seam hearing.

21 Water users' initial objection to the Tank
22 Seam application was based on their claim that the
23 springs would be adversely affected as a result of a
24 hydrological connection between the springs and the Tank
25 Seam. Co-Op responded first that there was -- that there

1 wouldn't be any impact because, to the best of our
2 knowledge at that time, there was no water to be
3 encountered at the Tank Seam level.

4 Water users' response was, Well, that's fine
5 and good, but Co-Op's mining plan contemplated pumping of
6 water from below up to the Tank Seam, that Co-Op intended
7 to introduce water into the Tank Seam level that was not
8 there, that Co-Op also intended to introduce oil and
9 other contaminants into the Tank Seam that was not there,
10 and that because of Co-Op's mining plan to put those --
11 the water contaminants into the Tank Seam, that there was
12 a hydrological connection between the Tank Seam and the
13 springs that would eventually result in those
14 contaminants making their way to the springs and
15 adversely affecting the springs.

16 Co-Op's only response and argument in evidence
17 in the Tank Seam hearing in response to that claim was to
18 say that it couldn't happen because there was no
19 hydrologic connection. It was thus necessary to resolve
20 that issue.

21 Now, the Board did make a statement in its
22 order that it thought it was -- that the -- what happened
23 in the Blind Canyon Seam was not relevant. To the extent
24 that that statement applies here, the Utah Supreme Court
25 took a look at that -- at what actually happened in the

1 Tank Seam hearing, the arguments and the evidence that
2 were presented, and decided that that was kind of a
3 misstatement, that indeed the evidence as to the
4 hydrologic connection between the permit area and the
5 springs was indeed relevant to the claim.

6 Finally, we need to keep -- distinguish
7 between claims and issues. Collateral estoppel applies
8 in two different proceedings, to resolve two different
9 claims, if issues that arise under those two claims are
10 identical. It matters not that the claims are not
11 identical. That's claim preclusion. Collateral estoppel
12 applies to issue preclusion, not claim preclusion. The
13 claims here are clearly different; the issues are the
14 same.

15 It's kind of like a party that is involved in
16 a traffic accident. They may be sued on a negligence
17 claim. They might also be facing a traffic citation.
18 Two different claims. An issue might be was the light
19 red or green. That would be an issue in the negligence
20 complaint. Was the light red or green -- that may be an
21 issue in the traffic citation. Two different claims, the
22 same issue. If one of those two claims resolves that
23 issue against an individual that's involved in the other
24 claim, that resolution in the one lawsuit is binding on
25 them in the other. That is what collateral estoppel is

1 about.

2 And what is -- what it has meant here: The
3 water users have had their day in court on these
4 particular issues I've identified. They've lost.
5 Collateral estoppel says they're not entitled to try
6 those particular issues again. They're certainly
7 entitled to raise objections. They're entitled to put on
8 evidence as to those objections. But when it comes to
9 these particular issues, the Board needs to go in by
10 taking those that are already resolved.

11 Thank you.

12 MR. LAURISKI: Thank you, Mr. Hansen.

13 Mr. Appel.

14 MR. APPEL: Thank you, Mr. Chairman. May it
15 please the Board. One of the reasons we're here -- and I
16 anticipated when you've heard the motion for
17 reconsideration -- at least some of you are familiar
18 faces from 1996 and 1995 -- that we probably would be
19 back. We had a hearing on the Tank Seam. And in the
20 course of creating those findings in a fact and
21 conclusions of law, the Board did rule on issues to the
22 Blind Canyon Seam, hence the problem with collateral
23 estoppel today.

24 I want to put aside for a moment the other
25 problems with the Division order, which would sustain an

1 appeal before you, and just talk about the collateral
2 estoppel. There are some salient facts and points I
3 think that Mr. Hansen neglected to mention. The first is
4 that they're now operating under a new theory of where
5 this water comes from. The facts are not identical. We
6 were before you before discussing this issue with respect
7 to the Tank Seam, even though that evidence was supposed
8 to be excluded.

9 There are two competing theories. One was our
10 theory, that they were connected. The next was Co-Op's
11 theory, that what was being intercepted were perched
12 aquifers. They've now abandoned the traditional perched
13 aquifer theory. We've heard this for the first time
14 before the Division. They believe that all the water in
15 the mine is coming from a sandstone channel which has
16 been tapped.

17 Now, that's a new theory. It's not in their
18 PHC. It's not in their CHIA. And it's not the same set
19 of facts that you had before you. So to suggest that
20 we're collaterally estopped when there's new information
21 and a new theory from the applicant alone is silly.

22 What we're here to find out before this Board
23 is whether or not, once and for all, there's a connection
24 between these mining efforts in the Blind Canyon Seam and
25 the springs in question. If there's no connection and we

1 adequately determine that, and we put the issue to rest.
2 If there is a connection, it's equally critical to know
3 that, because then we can figure out what type of relief
4 we're entitled to. We still don't know the answer to
5 these two -- well, now three viable competing theories
6 out there.

7 I mentioned that there's a new theory. There
8 are other reasons why collateral estoppel really
9 shouldn't be applied in such a situation. One is that
10 this isn't a dormant mine. They're continually removing
11 material. If -- as you continue to remove material, you
12 are potentially changing the recharge. You're
13 potentially changing the underground hydrogeology. And
14 these supports -- these are evolving situations. They
15 are new facts just about every day. I hesitate to say
16 that every scoop of coal creates a new set of facts, but
17 when you're bringing out truckloads of the stuff, it very
18 well may. So we're entitled to our day in court on that.

19 If you look at the Supreme Court's opinion,
20 they specifically did not address the collateral estoppel
21 issue. They left it for you folks to decide when it came
22 back. That issue was raised before the Division down
23 below, who has heard all of this information, and it was
24 rejected. The Division did not find there was collateral
25 estoppel.

1 Now, the four requirements of collateral
2 estoppel. My view -- and lawyers frequently disagree. I
3 suppose that's our job. If we always agreed, we'd be out
4 of work. But of the four issues, I think that three of
5 them are not met.

6 The issues, again, are: Are the issues
7 identical between the two proceedings? The answer to
8 that is no. We have a new theory. We have an evolving
9 mine effort. And we presented a different case down
10 below than we did before, and I'll get to that in a
11 moment.

12 Was there a final judgment on the merits of
13 this controversy? No. That was the Tank Seam. And I'll
14 get to that same point, again, in a moment. This is the
15 Blind Canyon Seam. There are two different cases, so the
16 answer to number two is no.

17 Are there identical parties? Yes. I agree
18 with that.

19 Number four: Was the issue competently,
20 fully, and fairly litigated? The answer to that is no,
21 for the -- some of the same reasons that numbers one and
22 two are answered no. We were specifically limited by
23 this Board in what we could do with respect to the Blind
24 Canyon Seam. And I can read you that.

25 Quoting the chairman: "The Board, in its

1 deliberations, determined that we would only consider
2 evidence as it relates to the impact of mining of the
3 Tank Seam. Just for the record, I want to read in how
4 this was noticed so that everybody understands the
5 framework in which we'll conduct this hearing. 'The
6 purpose of this proceeding will be for the Board to
7 consider the objection of the Petitioner to the Division
8 for determination of approving Co-Op Mining Company's
9 significant revision to extend its mining operations to
10 the Tank Seam.' That's also what appears in Petitioner's
11 motion for this hearing. And so that's how we're going
12 to conduct the hearing, by narrowing that focus as it
13 relates to the Tank Seam and impact of mining on that
14 Tank Seam. Okay?" To which we all resoundingly said,
15 "Okay."

16 We did not put on our case for the Blind
17 Canyon Seam. I don't know how many times I can say that
18 and be more clear. We didn't do it. The Division has
19 heard our case on the Blind Canyon Seam; you folks
20 didn't. You heard some contextual framework background
21 on general geology. You haven't heard our case. We
22 haven't had our day in court, and we believe we're
23 entitled to that.

24 I'd also like to quote Mr. Hansen in his
25 closing argument. This is what he said when we

1 approached you before: "Petitioners are only entitled to
2 a hearing on the reason for DOGM's decision to approve
3 the significant revision" -- going on to say the Tank
4 Seam. "Petitioners did not request, are not entitled to,
5 and did not receive a hearing on whether to approve or
6 modify the existing permit," relating again to the Blind
7 Canyon Seam. He told you what he asked for, what you
8 did, and what you received.

9 The problem we have here is that once this was
10 done and the findings of fact and the conclusions of law
11 came out, the Attorney General and attorney for Co-Op
12 flip-flopped. They decided, Well, gee, maybe we did do
13 that, or at least we should try to take advantage of the
14 fact that there are findings and conclusions in the
15 record on that.

16 Let me say it one more time: We haven't had
17 our day in court on the Blind Canyon Seam, and you'll
18 hear different things. In any event, there's a brand new
19 theory being relied on by Co-Op, so collateral estoppel
20 can't possibly apply. I don't think that they should
21 have filed this motion in the first place. I would plead
22 with you today to let us get this over once and for all.

23 I won't address the hearing examiner issue
24 right now. That's fairly brief, and we're to the point
25 we'd like to get it done correctly and over with once and

1 for all. If we end up with a collateral estoppel theory
2 applied here -- first of all, it should not be.
3 Secondly, it just prolongs these proceedings. We'd like
4 to get through, get to it and get through it.

5 Thank you.

6 MR. LAURISKI: Thank you, Mr. Appel.

7 Mr. Ellsworth.

8 MR. ELLSWORTH: I'd just like to echo what Mr.
9 Appel has said. In addition, we've had pointed out to us
10 the notion that we can produce evidence what's happened
11 since the hearing. This is something like asking us to
12 present evidence so we can see if it should be excluded.
13 That's sort of like performing an autopsy in order to
14 discover what sort of cure should be effected, which is
15 -- of course, is illogical.

16 The only thing I'd like to add to what Mr.
17 Appel has said is that we are quite eager to have this
18 completed. And since we have not had an opportunity to
19 present any evidence on the Blind Canyon Seam, it
20 certainly stands to reason that we ought to be given the
21 opportunity to present evidence, especially since there's
22 something on the order of a three-year gap between the
23 hearing and the evidence on the Blind Canyon Seam that
24 now has come to light.

25 That's all I have. Thank you.

1 MR. LAURISKI: Thank you.

2 Mr. Moquin.

3 MR. MOQUIN: Yes. I'd like to start out by --
4 one thing we all agree on, the elements we look at, the
5 four elements, the Division is particularly troubled by
6 the third, which is the competently, fully, and fairly
7 litigated. Our examination of the transcript --
8 admittedly, I was not the Division's attorney, so I have
9 to rely completely on the transcript, but the obvious
10 response to that is, so has the Supreme Court.

11 I think the transcript is very ambiguous on
12 whether the water users were allowed to present all their
13 evidence. If you look at the transcript, you'll see
14 initially that they were limited to giving just
15 foundational evidence concerning the Blind Canyon. Later
16 -- later in the hearing, the chairman, Mr. Lauriski,
17 seemed to open up the case to allowing any evidence in,
18 but it's very ambiguous and very contradictory.

19 And I would like to point out that the burden
20 of proving the elements of collateral estoppel are on Mr.
21 Hansen and the State of Utah. And while the Division,
22 looking at his pleadings, thinks that he has established
23 a prima facie case of collateral estoppel, we think that
24 the water users have rebutted it by saying they were not
25 given a fair chance to fully and fairly litigate the

1 Blind Canyon Seam. And the suggestion that the Division
2 was making is that perhaps the water users should be
3 given the opportunity to state to the Board or even
4 proffer evidence to the Board on how they were limited
5 and what sorts of evidence was excluded because of the
6 prior rulings of the Board.

7 I think that's all I have to say right now.

8 Oh, one other thing: I think the analogy of
9 the car accident actually explains why this is different,
10 because with the car accident, where collateral estoppel
11 does work, and does work well, you have a closed set of
12 facts. Nothing occurs after -- after that accident. We
13 have a continuing conduct case here. And all the
14 authorities on collateral estoppel are in agreement that
15 it's much more difficult to apply collateral estoppel
16 when you have continuing conduct, so I don't think that
17 the analogy is apt in this case.

18 MR. LAURISKI: Thank you.

19 Mr. Hansen, any rebuttal before the Board . . .

20 MR. HANSEN: Briefly, on a few points raised
21 by Mr. Appel. Co-Op has not abandoned its old theory of
22 a perched aquifer and proposed a new theory. What Co-Op
23 has done is determined more of the nature of what this
24 perched aquifer is. And the sandstone channel is really
25 a little bit more information on just what exactly the

1 nature of this perched aquifer is. It's just a
2 refinement of our knowledge as to the nature of the
3 aquifer, not the abandonment of one theory in favor of
4 the pursuit of another. And our permit has been modified
5 to reflect that information.

6 As to the issue as to the mine itself not
7 being dormant, the facts not being closed, it is true
8 that mining is ongoing, that that mine -- mining
9 operation does take coal out. If water users have some
10 evidence that changes resulting from those operations in
11 the last couple of years have affected things, then that
12 is a new issue, certainly, and it would not be a part of
13 our collateral estoppel. And we have not made that
14 argument. But what collateral estoppel says is that
15 you're not entitled to go out and gather new evidence to
16 try to resolve issues that were conclusively resolved
17 before.

18 I haven't heard any argument at all on the
19 questions as to the latter three points that I claim are
20 issues, which is: As of the date of the Tank Seam
21 hearing, had the springs at that point been adversely
22 affected as of that date? Was the mining operation
23 designed to prevent material damage? And as of that
24 date, had the permit -- was the permit application
25 complete and accurate? I don't think anybody disputes

1 that those three issues are barred by collateral
2 estoppel.

3 The only points that we're arguing about
4 really is the Board's decision on the existence of a
5 hydrologic connection. If a hydrological connection has
6 opened up in the last two years and the water users have
7 some evidence to put on on that particular point, that
8 would be an issue not barred by collateral estoppel. But
9 as of the Tank Seam hearing, was there a hydrological
10 connection? That issue was resolved, and they're not
11 entitled to a rehearing on that particular issue.

12 The Division -- as I read the Division's
13 determination as a result of the informal conference and
14 as I read the pleadings that have been -- memoranda that
15 have been put out on the collateral estoppel issue, the
16 Division didn't hear and reject the collateral estoppel
17 argument. They heard it, decided that before they went
18 -- before they resolved the issue, they wanted to hear
19 the evidence. And then after they heard the evidence,
20 they just went ahead and said, Well, on the merits we
21 side with the Co-Op Mine anyway, so it makes the
22 collateral estoppel question moot. The Division never
23 really ruled on that issue at all.

24 MR. LAURISKI: Well, Mr. Hansen, I don't think
25 that would have been the Division's place to rule on

1 collateral estoppel. We remanded this case back to the
2 Division for an informal conference, that we felt that
3 the water users hadn't been afforded an opportunity. Is
4 that true?

5 MR. HANSEN: You did remand the matter back to
6 the Division. Part of your remanding was a statement by
7 the Board saying, We do not resolve the collateral
8 estoppel issue. We leave that issue in the first
9 instance to be resolved by the Division. That was part
10 of the Board's order.

11 MR. MOQUIN: That is correct.

12 MR. LAURISKI: Thank you.

13 MR. HANSEN: I would point out that at the
14 Tank Seam hearing, water users made the argument -- this
15 is Mr. Craig Smith speaking in his opening argument --
16 that these springs are interconnected with the mining
17 activities, and the effect of mining, including the
18 mining of the Tank Seam, is having a negative impact both
19 on water quantity and water quality.

20 Now, if the existence of water at the Tank
21 Seam level was the only issue, we could have avoided
22 three days of hearing. We could have simply stipulated
23 there was no water there and be done with it. The whole
24 reason we had a three-day hearing was to determine
25 whether or not there was a hydrological connection

1 between the springs and the Tank Seam. Co-Op Mine's
2 theory was that there was no connection between the Tank
3 Seam and the springs because there was no hydrological
4 connection at all in the permit area to those two springs.

5 All the evidence -- essentially, every bit of
6 evidence on the entire three days of hearing was directed
7 to that specific issue, whether or not there was a
8 hydrologic connection there. The water users had every
9 incentive to present whatever evidence they had on that
10 issue because it did relate to the Tank Seam. They had
11 every opportunity to present whatever evidence that they
12 desired. There was not a single bit of evidence the
13 water users offered that the Board refused to consider,
14 in the face of numerous objections by both the Division
15 and the Co-Op Mine, all of which were ultimately
16 overruled.

17 Mr. Jeff Appel also quoted from my closing
18 argument. I'd like to go on from my closing argument,
19 where he ended. The issue is not what happened three
20 years ago in Big Bear and other mining operations. There
21 will be no material damage, as the Division has already
22 found, because, first, there is no water at the Tank
23 Seam; second, there is no significant risk of
24 contamination -- I'm skipping over a little bit here --
25 third, the uncontroverted evidence establishes that Big

1 Bear Spring is hydrologically isolated from the permit
2 area. And it also establishes that the Birch Spring is
3 hydrologically isolated from the permit area. There is a
4 great deal of testimony to the contrary, primarily from
5 Mr. Montgomery. I'm not going to go into any detail
6 there, but I'll demonstrate through my written argument
7 that his testimony is inconsistent, does not support the
8 conclusions that he would like the Board to come to.

9 That was my closing argument. The water
10 users' opening argument said that that was a central
11 issue: the hydrological connection or none, although the
12 entire three days of hearing was addressed to that
13 specific issue. Co-Op Mine's closing argument directly
14 addressed that specific issue.

15 All of the evidence that was offered was
16 accepted. Even today, the water users haven't made a
17 proffer as to any evidence that they had at that time
18 that they withheld and failed to produce. And I submit
19 that there was no such evidence or it would have been
20 proffered at some point up to now. And we contend,
21 again, that collateral estoppel applies, not only to the
22 latter three issues that I've identified, but as well to
23 the issues dealing with the hydrologic connection between
24 the springs and the permit area.

25 MR. LAURISKI: Thank you.

1 Mr. Appel.

2 MR. APPEL: Briefly, if I may, it's one thing
3 to quote from opening argument; it's another thing to
4 quote after the opening argument and the limitation that
5 the Board likely remembers giving us at the time. We did
6 not put on the Blind Canyon Seam case. Just wasn't done.

7 It's been a number of years. New information
8 was presented to the Division. Certainly, the -- whether
9 you want to call it a new theory as to where the water
10 comes from or you want to call it a twist or a
11 modification of an old theory, it's new information; it's
12 new evidence. We're entitled to review on that basis
13 alone in this particular case.

14 There also -- this particular argument
15 overlooks the other problems we believe exist with the
16 Division's order. We cited some 19 bases, in some cases
17 with a myriad of subparts, to sustain this appeal.
18 Whether this argument works or not is only part of it.
19 We have other problems with the Division's order, and
20 collateral estoppel cannot in any way resolve those.

21 So coupling the new evidence with the other
22 problems we see with the Division's order, it appears
23 that an appeal should go forward on our part. And again,
24 we'd just like to have the opportunity to present the
25 case we have on the Blind Canyon Seam, as it may have

1 changed over the past three years or so with the new
2 theories.

3 Thank you.

4 MR. LAURISKI: Mr. Ellsworth.

5 MR. ELLSWORTH: Nothing, Mr. Chairman.

6 MR. LAURISKI: Anything further?

7 MR. MOQUIN: No.

8 MR. LAURISKI: Questions from the Board?

9 Mr. Appel and Mr. Ellsworth, I think that it
10 would be appropriate that we ask the water users if they
11 can proffer that there is new evidence and what that
12 evidence is that may have occurred since the Tank Seam
13 hearing, or any evidence that you may not have been
14 allowed to present at the Tank Seam hearing that this
15 Board will consider. I think that's important for us to
16 make a decision on the collateral estoppel issue. And I
17 would ask the both of you if you can proffer any evidence
18 that was either not presented at that hearing or that has
19 occurred subsequent, new evidence that occurred
20 subsequent to that hearing.

21 MR. APPEL: That was a discussion that was
22 made in the Division's submission to the Board. Rather
23 than erring on the side of missing something, it might be
24 better for us to provide that to you within five days or
25 something.

1 The one that comes to mind right now is the
2 sandstone channel. We did our own sampling. As far as
3 the geochemistry, tritium, it was a much more thorough
4 examination of the general area. We have a brand new
5 expert -- it's not Mr. Montgomery anymore -- and he had
6 new theories, new approaches. He is well equipped to
7 testify because of his long association with the area.
8 He's worked in many mines up there. He's noticed how the
9 water flows.

10 Again, I note that there are things that I'm
11 going to miss. If you'd like a more formal statement of
12 this, we can do it. I'm a little troubled by that
13 because it basically -- even though the Board may need it
14 and can ask us to do it, it gives the -- Co-Op another
15 shot at us, which they might not ordinarily get, to raise
16 all the issues and just helps them to prepare, gives them
17 something that they might not otherwise be able to do.
18 So it affects our presentation before the Board. But
19 obviously, if you ask us to do it, we'll do it.

20 I've given you three or four. The geochemical
21 aspect is actually fairing wide-ranging. There were
22 tritium tests. I think we did the oxygen isotope tests
23 in comparison to theirs. We took our own samples from
24 the mine, which -- we didn't have that sort of
25 information before. And we have some -- I think there

1 are new -- there's new information in the literature that
2 was applied. Mr. Peter Nielsen is the person who is our
3 expert. He's testified before the Division.

4 And again, remind the Board that the Division
5 did not find collateral estoppel. You gave them an order
6 to look at this issue in the first instance, and they
7 held the hearing. And while there may not be a specific
8 finding, I think the fact we have an order and a hearing
9 -- had an entire hearing, when they could have
10 sidestepped it if they thought that collateral estoppel
11 applied, speaks volumes on that particular issue of
12 what's there.

13 I would be happy to supplement this in
14 writing. I've given you as much as I can think of
15 today. And I know had the Board really wanted to hear
16 that, I would have been ready.

17 MR. LAURISKI: Mr. Ellsworth.

18 MR. ELLSWORTH: Yes. When the Division is
19 talking about evidence they want proffered, are we
20 talking about -- we also want to know about evidence that
21 was excluded by your ruling. We also want to know about
22 evidence of any change that Mr. Hansen's alluding to that
23 there's been a hydrological change in the next couple of
24 years. We don't want evidence that they've developed
25 over the last few years to essentially retry the case.

1 That's not a requirement of collateral estoppel. And
2 it's interpreted to be that we want their entire new case
3 presented to the Board -- that's not what we want. What
4 we need is what was excluded by the rulings in the
5 previous hearing or any changes that have occurred that
6 would defeat collateral estoppel.

7 MR. LAURISKI: I was hoping that that's what I
8 was requesting. Was there any evidence that was
9 precluded or evidence that has arisen subsequent to that
10 hearing that this Board didn't hear in order for us to
11 make a ruling on collateral estoppel, whether or not we
12 should have a full evidentiary hearing or not? And
13 that's the question I'm posing to you two gentlemen.

14 MR. APPEL: I understand. And I would have to
15 go back and look at the pages of notes that I didn't use
16 for testimony to do that, and indicate what we've learned
17 since that time as well. I think that's important.

18 Certainly -- I think the new theory of the
19 sandstone channel in and of itself is enough to justify
20 the Board moving forward and collateral estoppel not
21 applying. If you look at what we've requested from the
22 Board, we've stated that the PHC and the CHIA need to be
23 revised because of that, because of other new information
24 that's come in. Certainly that's a valid issue and
25 unravels the collateral estoppel application.

1 MR. LAURISKI: Okay. Thank you.

2 Anything further from the Board?

3 Okay. Let's move to the second issue, then.

4 MR. APPEL: This is really very brief. In the
5 event we have the hearing, we think that after going
6 through the -- I guess it was probably about three and a
7 half days stretched over two and a half months down below
8 before the Division -- these are very complicated
9 issues. They are geologic issues upon which reasonable
10 geologic minds can disagree. Again, we'd like to answer
11 this question once and for all.

12 And we simply thought that a hearing examiner
13 possessing the expertise with hydrogeology and an
14 understanding of that area would assist the Board in
15 sifting through the vast amount of information that will
16 come in and deciding what's really important and what
17 isn't. It also assists us in our ultimate goal of
18 resolving this issue regarding hydrologic connection
19 regarding the mining efforts of Co-Op and the two springs
20 once and for all. We think that that expertise would
21 assist you.

22 You can't use the Division as you
23 traditionally might because they'll be adverse to us in
24 this instance. Again, I understand that you have staff.
25 With all due respect to the knowledge that is obviously

1 contained on this panel and that we've seen in the past,
2 we thought it might help. That's the only reason that we
3 suggested it.

4 It's in your discretion to do it or not. You
5 can create the ground rules for the hearing examiner.
6 You can dictate their task to them. You can keep as much
7 as you want or as little as you want. And if you have a
8 problem with what he recommends, you can go back on those
9 specific issues and take the evidence and hear it
10 yourself.

11 So basically, our position on that is, we
12 think it might help, having heard what happened before
13 the Division. If you agree, and we should do it; if you
14 don't agree, so be it.

15 MR. LAURISKI: Thank you.

16 Mr. Ellsworth.

17 MR. ELLSWORTH: I'd just like to add that the
18 hearing examiner is similar to the special masters that
19 are used by the courts under the Rules of Civil
20 Procedure. The expertise that such a person could bring
21 to this and apply to this without the -- I shouldn't say
22 it quite that way -- without the Board having to take the
23 time to winnow through a great deal of hydrogeological,
24 very specialized information and evidence. The special
25 master would, of course, offer findings of fact,

1 conclusions for the Board to approve or use.

2 Of course, the hearing examiner would not have
3 the final say. The Board would then have to only
4 consider exceptions or anything that, of course, it felt
5 needed to be reviewed again, de novo. And such
6 exceptions, of course, could be handled before the Board
7 in a single day; whereas trying to do all the
8 hydrogeological evidence might take three, perhaps even
9 four, to go through.

10 So I think -- just like to second what Mr.
11 Appel has said. We do feel that it would help things to
12 move along quickly and settle them once and for all.

13 Thank you.

14 MR. LAURISKI: Thank you.

15 Mr. Hansen.

16 MR. HANSEN: The Board ultimately has to
17 decide this case in any event. The Board is already
18 familiar with this case in its entirety. The Board is
19 already familiar with the entire history of Co-Op Mine
20 and its operation, the water users and their claims to
21 the spring and their claims as to the impacts. The Board
22 is already familiar with the facts. The Board is already
23 familiar with the applicable regulations and other laws
24 that bear on those facts. Those are regulations and laws
25 that this expert is not likely to be as familiar with as

1 the Board.

2 The Board, I believe, has the expertise to
3 consider the evidence that would be presented, both fact
4 evidence and expert testimony. The experts that have
5 been retained by both parties can certainly present their
6 information in a way that's simple enough that even you
7 poor members of the Board can understand. Don't have any
8 discomfort on my mind that the Board -- that the experts'
9 testimony is going to be so obtuse that you would not be
10 able to understand it. The issues are really not
11 complicated. They are really fairly straightforward.
12 Even the expert testimony is not nearly so esoteric as
13 the water users would have you believe.

14 Moreover, the Board, as a several-member panel
15 sitting there as a jury, and with seven people sitting up
16 there, I'm confident that we have more people listening
17 with a keen ear, more chances for the Board as a whole to
18 pick up on fine points that may be of interest to the
19 Board, may be able to raise those through the hearing.
20 That would be something that a hearing officer would not
21 have the advantage over the Board.

22 Basically, the hearing examiner just raises
23 another layer of hearings, because the water users claim
24 if there are any disputed issues, then the Board is going
25 to want to come back again and get another hearing; and

1 so rather -- lengthens, rather than shortens, the total
2 amount of time.

3 And as far as the need for a hearing examiner
4 to analyze the issues that -- the Board, if it needs to,
5 can certainly have its own experts standing by to advise
6 and inform the Board on points it feels it doesn't
7 understand.

8 I don't have any strong feelings on the point,
9 but I feel that the hearing examiner is unnecessary.

10 MR. LAURISKI: Thank you.

11 Mr. Moquin.

12 MR. MOQUIN: Yes. The Division also believes
13 that the hearing examiner is unnecessary. We believe
14 that Jim Carter conducted a fair and very competent
15 hearing. And we believe that he actually performed
16 essentially in the role of a hearing examiner. We also
17 have his transcript and -- to rely on, which is not
18 normal in an informal hearing, but we have prepared a
19 transcript that the Board can look at.

20 And the Division would like to resolve this
21 matter before the five-year permit -- before its time to
22 renew the five-year permit. We're essentially almost two
23 and a half years into this permit, and we wouldn't want
24 to -- objections to renewal going on simultaneously. And
25 if we prolong this much longer, we may have that unique

1 situation.

2 MR. LAURISKI: Thank you.

3 Questions from the Board?

4 Do you have anything further you'd like to say
5 before we take a break?

6 MR. APPEL: We'll submit it. I speak for
7 myself, anyway.

8 MR. ELLSWORTH: Yeah, that's fine.

9 MR. LAURISKI: Okay. Thank you.

10 Board's going to take a recess, go into
11 deliberations, and return.

12 (Recess taken, 11:02-11:30 a.m.)

13 MR. LAURISKI: Okay. We're back on the record.

14 The Board, in the request for collateral
15 estoppel, is going to take this matter under advisement.
16 Given what we've heard today, our order today will be
17 that we're going to allow the water users ten days to
18 respond in writing and to proffer to the Board what
19 evidence may have been excluded during the Tank Seam
20 hearing that needs to be considered by this Board on a
21 permit renewal for the Blind Canyon Seam. That's first.

22 Second, what new evidence there is that shows
23 a change as a result of continued mining in the Blind
24 Canyon Seam since the Board's order of June 13th, 1995,
25 that this Board should consider in the matter for

1 collateral estoppel. Then we will allow ten days for the
2 Division and Co-Op to respond to the water users'
3 filing. No -- no replies after that, okay?

4 MR. APPEL: Yes.

5 MR. LAURISKI: Okay. With respect to your
6 request to appoint a hearing examiner, in the event that
7 this Board decides to move forward with a full
8 evidentiary hearing on the five-year permit renewal, the
9 Board does not agree that there is a necessity to appoint
10 hearing examiner, that we have full expertise on this
11 Board, and the Board feels as though it should hear the
12 matter. So your request for a hearing examiner is
13 denied --

14 MR. APPEL: Okay.

15 MR. LAURISKI: -- okay?

16 Thank you, gentlemen.

17 MR. APPEL: One point of clarification, I
18 suppose: When we talk in terms of new evidence, we have
19 a natural system down there that takes time to
20 understand. We did not have that particular information
21 available to determine whether it was -- drought was
22 affecting the springs or it could be mining. Anything
23 new that would indicate that it could be mining, that it
24 was not available as of the time that you had the Tank
25 Seam hearing, I would think, would be fair game as well.

1 MR. LAURISKI: Well, I think our order is
2 fairly clear, and that is if -- two things, Mr. Appel:
3 what evidence was excluded and why it was excluded during
4 the first hearing that you think we didn't hear; and
5 secondly, what new evidence there may be that shows a
6 change as a result of continued mining in the Blind
7 Canyon Seam since our order of June 13th, 1995. That's
8 what this Board wants to consider.

9 MR. APPEL: I understand. And maybe it's just
10 me being overly technical or legalistic with the term
11 "excluded." If it was unavailable, is that part of your
12 meaning of "excluded"? My understanding of "excluded"
13 is, it was proffered, an objection was made, and it was
14 not taken in; or, perhaps if we extend it a bit, that
15 because of your original marching orders at the beginning
16 of the hearing, that we simply did not present it because
17 we deemed it excluded.

18 I can foresee an argument from the opposition
19 as to what the term "excluded" means, and that's simply
20 the question there. I need some clarification on that.

21 MR. LAURISKI: Well, I believe that with the
22 statement that was made by the Chair at that time, if you
23 believed that the Chair's statement prohibited you from
24 presenting evidence and you can show why that evidence
25 was excluded, that's the question that we need to have

1 answered.

2 Mr. O'Hara.

3 MR. O'HARA: Mr. Braxton raised an interesting
4 question on whether the Board intends ten working days or
5 ten calendar days, given the holidays. And I gather the
6 suggestion from the Division would be that it might be
7 ten working days.

8 MR. LAURISKI: That's satisfactory to me.

9 MR. HANSEN: If I may, just to make it clear,
10 if we can look at a calendar and set a date certain.

11 Ten working days would be December the 24th.

12 MR. LAURISKI: That's correct.

13 MR. HANSEN: I'm just confirming.

14 MR. LAURISKI: Correct. Ten working days is
15 December 24th.

16 MS. ERLER: Is that a state holiday?

17 MR. CHRISTENSEN: No.

18 MR. APPEL: And it will impact them more than
19 it will me. Merry Christmas.

20 MR. HANSEN: If we exclude the four-day
21 Christmas weekend and the four-day New Year's weekend --

22 MS. ERLER: Four?

23 MR. HANSEN: Christmas is on a Thursday.

24 MR. LAURISKI: Mr. Smith, is Friday, the 26th,
25 a holiday or is it a working day?

1 UNIDENTIFIED SPEAKER: It is a working day.

2 MR. LAURISKI: Okay. It is a working day.

3 MR. HANSEN: I just wanted to be sure so we're
4 all in agreement. I don't mind. Just so we're all
5 agreed on what the day is.

6 MR. LAURISKI: There are two holidays
7 following the second ten-day period. That's Christmas
8 Day, December 25th, and New Year's Day, January 1. All
9 other days that week are considered working days.

10 MR. HANSEN: That would be ten days to
11 respond, to January the 9th. Did the Board have -- just
12 for my peace of mind, did the Board have in mind any time
13 when the decision would be made or . . .

14 MR. LAURISKI: With the two ten-working-day
15 periods and getting the information to the Board, Board
16 would take this matter up for deliberation at its January
17 hearing, and it will provide a written order shortly
18 thereafter.

19 MS. CARTWRIGHT: Mr. Appel, did you agree with
20 the date, January 9th?

21 MR. APPEL: We do now, after looking at it
22 more closely. It sounded a bit odd.

23 I know you work through those two holidays
24 anyway.

25 MR. LAURISKI: So the dates are, for the water

1 users, December 24th, and for a response from the
2 Division and Co-Op, January 9th, 1998, okay?

3 MR. APPEL: Thank you for your consideration.

4 MR. LAURISKI: Thank you very much.
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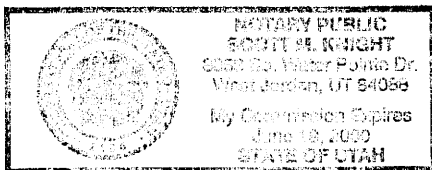
State of Utah)
 : ss.
County of Salt Lake)

THIS IS TO CERTIFY that the foregoing proceedings were taken before me, SCOTT M. KNIGHT, a Registered Professional Reporter and Notary Public in and for the State of Utah, residing at West Jordan, Utah;

That said proceedings were reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting and that a full, true, and correct transcription of said proceedings so taken and transcribed is set forth in the foregoing pages numbered from 3 to 42, inclusive.

I further certify that I am not of kin or otherwise associated with any of the parties to said proceedings, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at West Jordan, Utah, this 8th day of January, 1998.



Scott M. Knight

Scott M. Knight, RPR
Utah License No. 92-110171-7801

My Commission Expires:
June 19, 2000

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